

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SWI-CO CONSTRUCTION, INC., et al.,

Plaintiffs,

No. C 10-3122 PJH

v.

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

AMCO INSURANCE COMPANY, et al.,

Defendants.

Plaintiffs' motion for summary judgment came on for hearing before the court on March 7, 2012. Plaintiffs Swi-Co Construction, Inc., Swi-Co Construction, and Joe Swicegood (collectively "Swi-Co" or "plaintiffs") appeared through their counsel, Marc Sherman. Defendant Nationwide Mutual Insurance Company ("Nationwide" or "defendant") appeared through its counsel, Stephen Libertore, and Julian Pardini. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS plaintiffs' motion for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

This action arises out of an insurance coverage dispute. The court previously heard and decided defendant's motion for summary judgment with respect to coverage issues. Plaintiff's corresponding motion is now before the court.

A. Background Facts¹

Plaintiff Swi-Co Construction is a partnership entity between general partners

¹ Much of the background facts and evidence noted herein is identical to that submitted in connection with defendant's earlier motion, and are accordingly referenced by docket number submitted in connection with those earlier submissions.

1 plaintiff Joseph Swicegood and nonparty Michael Cote. In February 2004, Swi-Co
2 contracted with non-parties Pete and Caroline Kerston (the “Kerstons”) to construct their
3 home in Santa Rosa, California (the “project”). Swi-Co entered a written standard form
4 contract with the homeowners dated July 2, 2004 (the “contract”).

5 The Kerstons also hired an architect and civil engineers, who were not controlled or
6 employed by Swi-Co, to determine the site of the house in relationship to a nearby creek.

7 The contract required Swi-Co to “complete the Work described in the Contract
8 Documents for the project.” See Docket No. 30, Index of Def. Exs. (“Def. Index”), Ex. B. at
9 SWI 00356. The contract defined “Work” as “the construction and services required by the
10 Contract Documents, and includes all other labor, materials, equipment and services
11 provided by the Contractor to fulfill the Contractor’s obligations.” Id. at SWI 00367. The
12 work described in those contract documents included, among other tasks, grading, rough
13 and finish carpentry, flooring and building insulation. Id. at SWI 00361-66. Under the
14 heading, “Final Completion and Final Payment,” the contract provided that “[u]pon receipt
15 of a final Application for Payment, the Owner will inspect the Work”, and that “[f]inal
16 payment shall not become due until the Contractor submits to the Owner releases and
17 waivers of liens, and data establishing payment or satisfaction of obligations, such as
18 receipts, claims, security interests or encumbrances arising out of the Contract.” Id. at SWI
19 00370.

20 Sometime during the course of construction of the project, water was discovered in
21 the subfloor area of the house. See Def. Index, Ex. D. at 59 (Deposition of Joe
22 Swicegood). Swi-Co took measures to dry out the area, thinking that it was caused by
23 water from the plumbing system that had drained out into the subfloor area, but the water
24 reappeared and it was later determined that the plumbing was not the source of the water.
25 Id. at 47, 59. The water intrusion caused problems with the subfloor, joists, insulation, and
26 the duct work for the mechanical ventilation and heating systems. Id. at 55.

27 On October 4, 2005, when a hole was cut into the master bathroom subflooring to
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1 prepare for installation of a bathtub, mold was discovered on the underside of the
2 subflooring. Id. at 67-68; Declaration of Joe Swicegood ISO Pl. MSJ ("Swicegood Decl."), ¶
3 4. Michael Cote, Swicegood's partner in Swi-Co, "immediately contacted Nationwide to
4 make a claim" for the damage. Swicegood Decl. ¶ 4. Cote gave a statement to
5 Nationwide's claim representative, Nancy Klein, on October 14, 2005. Def. Ex. G.

6 By letter dated November 11, 2005, Nationwide formally denied the claim, citing
7 various policy exclusions. Declaration of Nancy Klein ("Klein Decl.") ¶ 4 and Def. Index, Ex.
8 H. Swicegood spoke to Ms. Klein who emphasized that the claim was denied because it
9 included mold damage. Swicegood Decl. ¶ 4.

10 B. The Insurance Policy

11 Defendant Nationwide² issued Commercial General Liability Policy No. ACP GLO
12 7880041365 (the "Policy"), effective April 8, 2005 to April 8, 2006, to plaintiff Swi-Co
13 Construction and to Joseph Swicegood and Michael Cote as a partnership entity doing
14 business as "Swi-Co Construction." See Def. Index., Ex. A at 100006, 100011. The policy
15 renewed for the following policy year without material change.

16 The policy provides liability coverage for qualifying "bodily injury" and "property
17 damage," as follows:

18 "We will pay those sums that the insured becomes legally obligated
19 to pay as damages because of "bodily injury" or "property damage"
20 to which this insurance applies. We will have the right and duty to
21 defend any "suit" seeking those damages. However, we will have
22 no duty to defend the insured against any "suit" seeking damages
23 for "bodily injury" or "property damages" to which this insurance
24 does not apply."

25 Def. Index, Ex. A at 10013, 100025, 100027-28.

26 The Policy also carved out a variety of exclusions from coverage. The three
27 exclusions which are highlighted by the parties as relevant to the present motion are the j5
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27 ² Nationwide was erroneously named in the complaint as AMCO Insurance
28 Company. At the initial case management conference held on December 9, 2010, the parties
stipulated that Nationwide is the proper defendant in this action.

1 exclusion; the j6 exclusion; and the exclusion for fungi or bacteria contained in the
2 endorsement to the policy. Those exclusions preclude coverage for “damage to property”
3 as follows:

4 **j5 exclusion.** This provision excludes coverage for “Property damage” to: “[t]hat
5 particular part of real property on which you or any contractors or subcontractors working
6 directly or indirectly on your behalf are performing operations, if the “property damage”
7 arises out of those operations...”.

8 **j6 exclusion.** This provision excludes coverage for “Property damage” to: “[t]hat
9 particular part of any property that must be restored, repaired or replaced because “your
10 work” was incorrectly performed on it...”.

11 **Fungi/bacteria exclusion.** In a modifying endorsement added to the insurance
12 contract, this exclusion states that “[t]his insurance does not apply to:

13 (a) “Bodily injury” or “property damage” which would not have
14 occurred, in whole or in part, but for the actual, alleged or threatened
15 inhalation of, ingestion of, contact with, exposure to, existence of, or
16 presence of, any “fungi” or bacteria on or within a building or
structure, including its contents, regardless of whether any other
cause, even, material or product contributed concurrently or in any
sequence to such injury or damage; and

17 (b) Any loss, cost or expenses arising out of the abating, testing for,
18 monitoring, cleaning up, removing, containing, treating, detoxifying,
19 neutralizing, remediating or disposing of, or in any way responding to,
or assessing the effects of, “fungi” or bacteria, by any insured or by
any other person or entity.

21 See Def. Index, Ex. A at 100016-17, 100043.

22 Finally, the Policy included the following relevant definitions:

23 **“Your work.”** This term is defined to mean “ 1) Work or operations performed by
24 you or on your behalf; and 2) Materials, parts or equipment furnished in connection with
25 such work or operations...”. See Def. Ex. A at 10013, 100025, 100027-28.

26 C. The Kerston Action

27 In May 2006, the underlying homeowners – the Kerstons – filed suit against Swi-Co

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1 Construction, Inc., as well as the architect and engineers who were involved in the project.
2 The homeowners alleged claims for breach of contract, breach of express warranty, breach
3 of implied warranty, negligence, and negligence per se against Swi-Co Construction, Inc.
4 Def. Index, Ex. F. The Kerstons alleged that the site had been improperly graded, water
5 intrusion had damaged subflooring and structural and framing members, and mold had
6 damaged components of the home. Id. at 200003-04. The homeowners further alleged
7 that they had been damaged by an ongoing obligation to pay Swi-Co \$8,000 for “overhead
8 and supervision” and by ongoing loss of the use of the residence. Id. at 200005.

9 On June 6, 2006 Swi-Co tendered defense of the homeowners’ action to
10 Nationwide. The claim was then assigned to litigation consultant Greer Malone to
11 determine whether Nationwide had any coverage obligation to defend Swi-Co. Ms. Malone
12 sought advice from in-house counsel with respect to Swi-Co’s tender of defense. Barbara
13 Ochsner, one of Nationwide’s in-house attorneys, directed Ms. Malone to contact Michael
14 Cote to learn whether the construction project had been completed. Def. Index, Ex. J. Ms.
15 Malone spoke to Mr. Cote and noted in her file diary that Mr. Cote told her that “the
16 construction on the house is not complete as the floor coverings have not been installed &
17 cannot be installed until the mold problem is resolved. Id., Ex. K. Ms. Malone reported to
18 Ms. Ochsner about her telephone conversation with Mr. Cote, and Ms. Ochsner
19 recommended that Nationwide deny coverage. Id., Ex. L.

20 On August 18, 2006, Ms. Malone sent a denial letter to Joe Swicegood of Swi-Co,
21 declining Swi-Co’s tender of defense in the [Kerston] homeowners’ lawsuit. Def. Index, Ex.
22 M. Mr. Swicegood subsequently spoke to Ms. Malone and informed her that more than
23 mold was involved in the claims: the damage included saturation to insulation and
24 degradation of pipes, HVAC and other duct work that needed to be replaced. Mr.
25 Swicegood contends that no Swi-Co operations were occurring on the subfloor, ducts,
26 piping and other locations on which water damage was alleged.

27 Swi-Co entered a settlement with the homeowners after paying over \$60,000 of
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1 company funds to defend the action. As part of the settlement, Swi-Co paid remediation
2 costs, cancelled a \$101,000 promissory note owed by the homeowners, waived over
3 \$100,000 in unpaid invoices and interest, and paid its own attorneys' fees and costs. The
4 Swi-Co partnership dissolved by the time of the settlement.

5 D. Procedural History

6 Plaintiffs filed this action against defendant Nationwide in the Superior Court for
7 Sonoma County on June 21, 2010. Defendant removed the action to this court on July 16,
8 2010. On August 30, 2010, plaintiffs filed a first amended complaint ("FAC") which alleges
9 two causes of action against defendant: (1) breach of contract for failure to defend Swi-Co
10 in the [Kerston] homeowners' action under the policy; and (2) breach of the implied
11 covenant of good faith and fair dealing. See FAC. Each of these causes of action revolves
12 around the fundamental question whether the [Kerston] homeowners' claims were covered
13 by the policy.

14 E. The Court's Prior Summary Judgment Order

15 On April 25, 2011, Nationwide filed its motion seeking summary judgment on both
16 claims, or, in the alternative, partial summary judgment. The court held the hearing on
17 June 22, 2011, and subsequent to that, requested further briefing.

18 On September 19, 2011, the court issued its ruling granting summary judgment in
19 part and denying it in part. See generally MSJ Order. After reviewing the relevant and
20 applicable legal principles, the court first considered whether the policy affirmatively
21 provided coverage for the claims asserted in the Kerston action. The court compared the
22 language of the Policy with the allegations of the Kerston complaint, and noted that
23 Nationwide had conceded that "on its face, the allegations of the homeowners' complaint
24 alleging damage to their house are sufficient to bring Swi-Co's claim within the scope of the
25 policy's insuring agreement." See MSJ Order at 11. The parties' dispute as to coverage
26 therefore boiled down to whether any of the three relevant exclusions – the j5 exclusion, j6
27 exclusion, or mold exclusion – applied.

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1 Turning to the j5 exclusion – which excluded coverage for property damage arising
2 out of the insured's ongoing operations – the court noted that there was no genuine dispute
3 that Swi-Co had not completed the construction project to build the home at the time the
4 water intrusion and mold damage was discovered. In other words, there was no dispute
5 that the water intrusion and mold development occurred while plaintiffs and/or their
6 subcontractors were performing 'ongoing operations' on the property as a whole. See MSJ
7 Order at 12. However, the parties disputed whether, as a matter of law, the j5 exclusion
8 excludes coverage for any and all property damage occurring on the property before the
9 insured has completed all of its work on the property as a whole, or whether it just excludes
10 coverage for property damage that occurs as a result of a particular isolated project that the
11 insured is working on and has not yet completed.

12 The court determined that the j5 exclusion is ambiguous as to whether the work
13 excluded under j5 incorporates the entire project, or only a part or component of the
14 project. In so ruling, the court discussed and relied upon three California cases that had
15 construed similar exclusions: Eichler Homes v. Underwriters at Lloyd's, 238 Cal. App. 2d
16 532 (1965); Blackfield v. Underwriters at Lloyd's, 245 Cal. App. 2d 271 (1966); and Owens
17 Pacific Marine, inc. v. Insurance Co. of North America, 12 Cal. App. 3d 661 (1970).

18 Those cases, noted the court, recognized that exclusionary language that was
19 similar to that contained in the j5 exclusion here created an ambiguity as to whether the
20 work being excluded under the policy was the entire project, or only the component part of
21 the project that failed. And because any ambiguity must be resolved against the insurer,
22 the earlier court cases held that the "work product exclusion" excluded only damages to the
23 failed work itself, not to the entire project. Following this reasoning, the court concluded
24 that plaintiffs's proposed construction of the j5 exclusion – to exclude only damage to a
25 particular part of construction on which the contractor is performing operations and not to
26 the whole house until the entire project is complete – was reasonable and supported by the
27 ordinary and plain meaning of the exclusionary language. Thus, in construing the
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1 ambiguous language of the j5 exclusion, the court held that it does not apply to the entire
2 construction project, and Nationwide's motion for summary judgment on the ground that it
3 had no duty to defend pursuant to the j5 exclusion was denied. See MSJ Order at 15-16.

4 Turning to the j6 exclusion – which precluded coverage for “that particular part of
5 any property that must be restored, repaired or replaced because ‘your work’ was
6 incorrectly performed on it” – the court noted that the parties disputed whether plaintiffs’
7 vicarious liability for the alleged negligence by the architect and engineers hired by the
8 Kerstons is covered by “your work.” The court found, however, that for similar reasons to
9 those discussed in connection with the j5 exclusion, the j6 exclusion does not apply to the
10 work of others, such as architects and engineers, who are not subcontractors of Swi-Co or
11 otherwise under plaintiffs’s direction. MSJ Order at 16.

12 The court then noted that, although Nationwide argued that the allegations of the
13 Kerston complain established that certain portions of the project had to be restored,
14 repaired or replaced because Swi-Co’s work was allegedly incorrectly performed, the
15 question whether Swi-Co’s work was in fact incorrectly performed and caused the property
16 damage was a disputed issue of material fact. The court further noted that Swi-Co pointed
17 out that another disputed factual issue existed over which particular part of the property, if
18 any, had to be restored, repaired, or replaced – a contention to which Nationwide did not
19 respond. For these reasons, the court determined that the “question whether Swi-Co, the
20 architects or the engineers incorrectly performed their work raises genuine issues of
21 disputed fact as to whether the j6 exclusion applies to the claimed damage.” The court
22 then denied Nationwide’s motion for summary judgment on the ground that it owed no duty
23 to defend pursuant to the j6 exclusion, but specified that its ruling that the j6 exclusion does
24 not apply to the work of others who are not plaintiffs’ subcontractors, is deemed established
25 for purposes of trial. MSJ Order at 17.

26 Finally, with respect to the mold exclusion, the court noted that the policy plainly and
27 clearly excludes damages arising from the presence of mold, but held that plaintiffs had
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1 demonstrated that the Kerston complaint alleged damage other than mold, presenting a
2 factual dispute as to whether any part of the claim against plaintiffs is potentially covered,
3 thereby triggering Nationwide's duty to defend. The court also denied Nationwide's motion
4 with respect to the duty to defend against claims for non-mold damage. MSJ Order at 17.

5 While the court thus denied Nationwide's motion for summary judgment with respect
6 to the breach of contract/duty to defend claim, for all the foregoing reasons, the court
7 subsequently went on to grant Nationwide's motion for summary judgment as to plaintiffs'
8 claim for the breach of the implied covenant of good faith and fair dealing. The court also
9 granted Nationwide's motion with respect to plaintiffs' prayer for punitive damages. MSJ
10 Order at 18-19.

11 F. The Instant Motion

12 Following defendant's motion for summary judgment, and because the court noted
13 at the hearing on defendant's motion that the case would still be viable absent plaintiffs'
14 own motion for summary judgment allowing the court to dispose of the issues presented,
15 plaintiffs filed the present motion.

16 In it, plaintiffs seek summary judgment with respect to the remaining breach of
17 contract claim alleged in its complaint. Namely, plaintiffs seek a ruling that it is entitled to
18 judgment with respect to its claim that Nationwide breached its duty to defend.

19 **DISCUSSION**

20 A. Legal Standards

21 Summary judgment shall be granted if "the pleadings, depositions, answers to
22 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
23 no genuine issue as to any material fact and that the moving party is entitled to judgment
24 as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of
25 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to
26 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
27 verdict for the nonmoving party. Id. The court must view the facts in the light most

1 favorable to the non-moving party and give it the benefit of all reasonable inferences to be
2 drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
3 587 (1986).

4 The party moving for summary judgment bears the initial burden of demonstrating
5 the absence of a genuine issue of fact for trial. See Celotex Corp. v. Catrett, 477 U.S. 317,
6 323 (1986). When the moving party will have the burden of proof on an issue at trial, it
7 must affirmatively demonstrate that no reasonable trier of fact would find other than for the
8 moving party. On an issue for which the nonmoving party will have the burden of proof at
9 trial, the moving party need only point out “that there is an absence of evidence to support
10 the nonmoving party’s case.” Id. Once the moving party satisfies its initial burden, the
11 nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, “set
12 forth specific facts showing that there is a genuine issue for trial.” FRCP 56(e). If the
13 nonmoving party fails to make this showing, “the moving party is entitled to judgment as a
14 matter of law.” Celotex, 477 U.S. at 323.

15 B. Legal Analysis

16 Plaintiffs’ motion for summary judgment raises two overriding issues for disposition:
17 (a) whether plaintiffs are entitled to a judgment that Nationwide breached its duty to defend
18 plaintiffs against the claims asserted in the underlying Kerston action; and (b) if so, whether
19 there is any dispute as to plaintiffs’ resulting damages. As already noted by the court in
20 connection with defendant’s earlier motion for summary judgment, the duty to defend arises
21 whenever an action alleges any claim that “potentially” or “possibly” could be covered by
22 the policy in question. Buss v. Superior Ct., 16 Cal. 4th 35, 45-46 (1997). Furthermore,
23 any doubts as to whether the insurer has a duty to defend must be resolved in the insured’s
24 favor. George F. Hillenbrand, Inc. v. Ins. Co. of N. Am., 104 Cal. App. 4th 784, 800-01
25 (2002).

26 Preliminarily, the court addresses the scope of the present motion, in view of its prior
27 order addressing defendant’s motion for summary judgment. Plaintiffs contend that the
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1 court's prior order already determined that exclusion j5 is ambiguous, such that a
2 construction in plaintiffs' favor was appropriate, and furthermore that the mold exclusion
3 does not apply, thereby leaving only one issue for substantive resolution here: whether the
4 j6 exclusion applies to preclude coverage for the Kerston allegations.³ Defendant,
5 however, seeks to re-argue the meaning and applicability of exclusion j5 in addition to
6 exclusion j6, and furthermore seeks a determination that no affirmative coverage should
7 result in the first instance.

8 As stated at the hearing on plaintiffs' motion, the court declines defendant's invitation
9 to reconsider those items which it has already ruled upon. Furthermore, although
10 defendant explains its failure to seek reconsideration earlier on grounds that plaintiffs'
11 motion was filed before defendant had a chance to do so, the court finds this an insufficient
12 excuse to discharge defendant's responsibility to seek formal reconsideration pursuant to
13 applicable local rules. Moreover, and no doubt because defendant has pressed its
14 reconsideration argument by way of the instant motion rather than through a more
15 appropriate motion for reconsideration, the majority of the arguments defendant makes
16 were not only already argued by defendant in its original motion and in the supplemental
17 briefing to that motion, but have also been set forth without any attempt to distinguish for
18 the court any additional law or facts that might warrant affirmative reconsideration of the
19 court's prior ruling.

20 All of which compels the court to confirm that its prior ruling in connection with issues
21 raised in defendant's motion for summary judgment will be treated as law of case, and
22 control the discussion here where applicable.

23 With this understanding in mind, the court turns to the following substantive
24 contentions raised by plaintiffs: (1) that Nationwide has conceded that the Kerston
25 complaint's allegations fall within the definition of affirmative coverage; (2) that the mold

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27 ³ Plaintiffs have moved for summary judgment on the grounds already ruled upon,
28 but essentially contend that entry of summary judgment in their favor is appropriate on these
grounds without need of substantive discussion, in light of the court's prior ruling.

1 exclusion does not apply; (3) that the j5 exclusion does not apply; (4) that the j6 exclusion
2 does not apply; and (5) that it is undisputed that plaintiffs suffered damages in the amount
3 of \$301,334.41.

4 1. Coverage

5 With respect to the question of affirmative coverage, the court's prior order
6 previously considered whether the underlying Policy "covers the claims asserted in the
7 homeowners' complaint." See MSJ Order at 10. The court's decision reviewed the
8 allegations of the Kerston complaint, and furthermore noted that "Nationwide concedes that
9 on its face, the allegations of the homeowners' complaint alleging damage to their house
10 are sufficient to bring Swi-Co's claim within the scope of the policy's insuring agreement,"
11 before concluding that a finding of affirmative coverage was appropriate. MSJ Order at 11.

12 This holding still controls. Although defendant now asserts that it made no such
13 concession, and that plaintiffs' contention that the Kerston complaint alleges damages
14 caused by independent third parties precludes liability – and therefore, affirmative coverage
15 – for plaintiffs, the fact remains that Nationwide did concede, at the time the issue of
16 affirmative coverage was first raised, that the Kerston complaint's allegations fell within the
17 coverage provisions of the Policy. Moreover, however, even if the court were to revisit this
18 argument, defendant's position is unpersuasive. It is undisputed that the Kerston complaint
19 does allege that plaintiffs, as well as third parties, are responsible for causing property
20 damage to the home. See Swicegood Decl., Ex. B at ¶¶ 11, 14, 36-38. While defendant
21 posits, based on plaintiffs' argument here, that plaintiffs had no legal obligation to pay any
22 third parties for their independent conduct based on the Kerston complaint's allegations, no
23 such determination could have been made until the liability issues were resolved in
24 Kerston. Yet as plaintiffs correctly point out, an insurer's duty to defend is determined at
25 the outset of litigation by the allegations of the complaint, and the *possibilities* that it raises
26 with respect to coverage. See Montrose v. Super. Ct., 6 Cal. 4th 287, 296 (1993). Thus,
27 for purposes of determining affirmative coverage vis a vis the duty to defend, defendant's
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1 argument that the court should depart from its prior ruling that affirmative coverage has
2 been established, is unavailing.

3 2. Mold Exclusion

4 Turning to the question whether the mold exclusion applies, the court's prior order
5 held that plaintiffs had demonstrated that the Kerston complaint's allegations alleged
6 damage other than mold, triggering a factual dispute as to whether any part of the claim
7 against Swi-Co is potentially covered, and furthermore triggering Nationwide's duty to
8 defend (since there was at least the "possibility" that coverage resulted for non-mold
9 claims). See MSJ Order at 17. Accordingly, to the extent plaintiffs seek summary
10 judgment on grounds that the mold exclusion did not excuse Nationwide's duty to defend,
11 plaintiffs' motion is GRANTED.

12 3. j5 Exclusion

13 Similarly, plaintiffs also rely on the court's prior ruling concluding that exclusion j5 is
14 ambiguous, that it should therefore be interpreted in the insured's favor, and that plaintiffs'
15 proposed construction – i.e., that the j5 exclusion does not apply to the entire construction
16 project – is reasonable and consistent with the plain and ordinary meaning of the language.
17 See MSJ Order at 15-16 ("[p]ursuant to Civil Local Rule 56-3, the court hereby specifies
18 that the court's interpretation of the j5 exclusion is deemed established for purposes of trial
19 of this case"). As already noted, there is no justification for departing from the court's prior
20 holding. Thus, and applying the court's prior ruling here, the court concludes here that
21 exclusion j5 does not operate to exclude coverage, and can provide no basis for a refusal
22 to defend. Plaintiffs' motion for summary judgment with respect to the inapplicability of
23 exclusion j5 is accordingly GRANTED.

24 4. j6 Exclusion

25 As plaintiffs note, the true substantive issue for the court to resolve is whether the j6
26 exclusion applies. Exclusion j6 excludes coverage for "[t]hat particular part of any property
27 that must be restored, repaired or replaced because 'your work' was incorrectly performed

1 on it." Def. Index, Ex. A at 100017. Previously, the parties disputed whether plaintiffs'
2 alleged vicarious liability for the purported negligence by the architect and engineers hired
3 by the Kerston homeowners (as alleged in the Kerston complaint) was covered by "your
4 work." Nationwide contended that all of the work at the project is considered the work of
5 Swi-Co as the general contractor, whereas plaintiffs contended that it was not. The court
6 ruled in plaintiffs' favor on this point in its MSJ Order, and furthermore noted that its
7 "interpretation of the j6 exclusion not to apply to the work of others who are not Swi-Co's
8 subcontractors is deemed established for purposes of trial" on the question whether the j6
9 exclusion applies to the claimed damage.

10 Based on the foregoing, as long as the Kerston complaint alleges that plaintiffs were
11 responsible for the work performed incorrectly by others – including the architect and
12 engineers who were hired by Kerston and not by plaintiffs – then exclusion j6 does not
13 apply, and can provide no basis for Nationwide's refusal to defend.

14 In support of the argument that the Kerston complaint alleges work performed
15 incorrectly by others, and plaintiffs' liability therefor, plaintiffs point out: that paragraph 14 of
16 the Kerston complaint establishes that the damage for which the Kerston plaintiffs were
17 suing was due to the placement of the house and/or its grading; and that water intrusion
18 occurred and components and elements of the house were damaged because of the
19 placement and/or grading. See Swicegood Decl., Ex. B at ¶ 14. Plaintiffs further point out
20 that Swi-Co did not do the grading which the Kerstons alleged needed to be corrected;
21 rather, RCX, Mann, and the Kerstons' landscaper did, and the grading and siting design
22 was done by LaFranchi. See Swicegood Decl., ¶¶ 2, 11; Ex. J. In addition, plaintiffs also
23 note that the j6 exclusion only applies to property that must be restored, repaired or
24 replaced because an insured's work was incorrectly performed on it. Here, the Kerstons
25 indicated that they were seeking damages for cost of restoring, replacing or repairing
26 insulation, pipes, HVAC, and other duct work. Swicegood Decl., ¶ 15, Ex. M. But these
27 components were not constructed incorrectly by Swi-co – or anyone else. See id. Indeed,

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1 some of the components were installed by third party Furia. See id., ¶ 14, Ex. I. All of
2 which, say plaintiffs, establish that no triable dispute exists that exclusion j6 does not apply
3 to preclude Nationwide's defense duty to Swi-Co.

4 Defendant, however, points out that plaintiffs were responsible for the grading and
5 siting on the property. They rely on plaintiffs' mediation statement in the underlying Kerston
6 action, in which plaintiffs' counsel stated: that Swi-Co, with the assistance of its grading
7 subcontractor, built the compacted dirt building pad, and put grade beam foundations in
8 place; poured pier and grade beans; and that Mr. Swicegood (of Swi-Co's partnership)
9 obtained permission from the owners to build the house in a different location after he
10 discovered siting irregularities. See Cote Decl., Ex. A at 3, 6. Thus, if plaintiffs did
11 incorrectly perform their own work on the property, defendant asserts that exclusion j6
12 applies.

13 The parties' dispute with respect to the grading and siting performed on the property
14 – i.e., whether Swi-Co in fact performed the grading and siting work alleged to have caused
15 the damage referenced in the Kerstons' complaint, and whether any of this work was done
16 incorrectly – properly constitutes a material dispute of fact. See also MSJ Order at 17
17 (noting that “the question whether Swi-Co, the architects or the engineers incorrectly
18 performed their work raises genuine issues of disputed fact as to whether the j6 exclusion
19 applies to the claimed damage”). However, plaintiffs also contend that, even putting aside
20 the siting and grading question, the Kerstons' complaint nonetheless alleged property
21 damage covered by Nationwide's policy, since the complaint sought damages for insulation
22 and ducting installed by Furia – which plaintiffs had nothing to do with. Swicegood Decl.,
23 ¶¶ 14, 15, Exs. I, M. Defendant's argument, which is limited to the grading and siting
24 issues, does not actually dispute this fact. Thus, there is no actual dispute that at least
25 some of the Kerston complaints' allegations allege that plaintiffs are responsible for
26 property damage resulting from insulation and ducting work that was in fact performed by
27 others. As such, the complaint alleges at least a “possibility” that coverage would apply,
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1 which coverage would not be precluded by the j6 exclusion. This in turn, should have
2 triggered Nationwide's duty to defend.

3 Accordingly, plaintiffs' motion for summary judgment with respect to the
4 inapplicability of exclusion j6 is GRANTED.

5 5. Damages

6 Finally, plaintiffs argue that they are entitled to damages in the amount of
7 \$301,334.41, plus prejudgment interest, as a result of their defense and settlement of the
8 Kerston action. Plaintiffs more specifically itemize their damages amounts as follows:
9 \$107,444.88 in construction costs and invoices that had not been paid by the Kerstons; a
10 \$101,000.00 promissory note that Swi-Co agreed to cancel (plus another \$14,886.46 in
11 interest charges on the note); remediation costs of \$13,218.43; and \$4,067.00 in
12 "Standards of Excellence," Interest and Attorneys Fees. See Cote Decl., Exs. A-E. In
13 addition, plaintiffs assert they paid \$60,717.40 to defend the action. Id., Ex. G.

14 Defendant objects to the inclusion of the promissory note's value in plaintiffs'
15 damages calculation, on grounds that plaintiffs relinquished their right to collect on the note,
16 and furthermore objects that all other components of plaintiffs' damages claim are extra-
17 contractual and barred by the court's prior entry of summary judgment on the good faith/fair
18 dealing claim. The problem for defendant, however, is that defendant submits no
19 controlling or persuasive legal authority for its assertions. As such, it has failed to
20 meaningfully oppose plaintiffs' argument that they are entitled to these amounts.
21 Moreover, the court is persuaded that the amounts submitted by plaintiffs do, in fact,
22 adequately correspond with the amounts that plaintiffs were required to pay or forego, in
23 order to dispose of the claims asserted against them in the underlying Kerston action.
24 Such amounts are appropriately considered as part of plaintiffs' damages claim.

25 In sum, the court concludes that plaintiffs have adequately discharged their burden
26 to demonstrate damages resulting from defendant's failure to tender a defense, and
27 summary judgment as to damages is accordingly GRANTED.

28

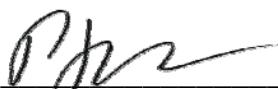
1 C. Conclusion

2 For all the foregoing reasons, the court hereby GRANTS plaintiffs' motion for
3 summary judgment on grounds that no exclusion applies to excuse defendant's failure to
4 provide a defense in connection with the allegations of the Kerston complaint, resulting in
5 defendant's breach of the duty to defend regarding the same. Summary judgment is
6 furthermore GRANTED to the extent plaintiffs seek damages in the amount of \$301,334.41,
7 plus interest.

8

9 **IT IS SO ORDERED.**

10 Dated: April 26, 2012


11 PHYLIS J. HAMILTON
12 United States District Judge